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Supreme Court, U.S.
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No. 92-1874

In The

Supreme Court of the United States

October Term 1992

SANDY RIVER NURSING CARE CENTER, *et al.*,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the federal antitrust laws provide no remedy for price increases resulting from the enactment of state insurance rate legislation, regardless of an allegation that the legislation was "coerced" by conduct of private parties.

2. Whether plaintiffs' alternative appellate theory of an agreement not to deviate below the maximum rates established by the Maine Superintendent of Insurance was foreclosed because it was never presented to the District Court.

3. In the event of a negative answer to question 2, whether the Court of Appeals correctly held that such an agreement would be shielded by the state action doctrine based on (a) statutory authorization similar to those held to satisfy the "clear articulation" requirement in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), and (b) an uncontested showing of active regulatory supervision.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the U.S. Supreme Court Rules of Practice and Procedure, the parent companies and subsidiaries (other than wholly-owned subsidiaries) of each respondent are as follows:

1. **The Aetna Casualty and Surety Company**
Aetna Casualty & Surety of Illinois
The Standard Fire Insurance Company
The Automobile Insurance Company of Hartford

   The parent company of respondent The Aetna Casualty and Surety Company is Aetna Life and Casualty Company. The Aetna Casualty and Surety Company is the parent company of the other respondents. Any and all subsidiaries of these respondents are wholly-owned.

2. **American International Group, Inc.**
American Home Assurance Company
Burmingham Fire Insurance Company of Pennsylvania
Commerce and Industry Insurance Company
The Insurance Company of the State of Pennsylvania
National Union Fire Insurance Company of Pittsburgh, Pennsylvania

   American International Group, Inc. is the parent company of all other respondents. Its subsidiaries which are not wholly-owned are: AIG Real Estate Investment & Management Co., Inc.; AIG Real Estate Investment & Management Co. (P.R.), Inc.; AIG Realty, Inc.; American International Realty

Corp.; Chlyoda Consultants Kabushiki Kaisha; Collinsbrook Building, Inc.; Eastgreen, Inc.; Kapatiran Realty Corporation; PineStarr Realty, Inc. (formerly Davedeb Realty Corporation); Pine Street Brokers Corp.; 206 Sansom Street Corp.; 270 Carpenter Drive Building, Inc.; AIA Capital Corporation; AICCO, Inc.; AIG Capital Corp.; AIG Clearing Corporation; AIG Export Investors, Inc.; AIG Funding, Inc.; AIG Financial Products Corp.; AIG Financial Products (U.K.) Limited; AIG Financial Products (Japan) Limited; AIG Financial Securities Corp.; AIG Financial Securities (U.K.) Limited; AIG Global Investors, Inc.; AIG International Limited; AIG Investment Advisers, Inc.; AIG Investment Corporation; AIAG Investment Corporation (Asia) Limited; AIG Investment Corporation (Japan); AIG Matched Funding, Inc.; AIG Mortgage Finance Co., Inc.; AIG Options, Inc; AIG Trading Corporation; AIG Trading Limited; AIGOF Investments I, Inc. (formerly AIG Overseas Finance Europe, Inc.); AIGOF Investments II, Inc.; AIGOF Investments III, Inc.; AIGOF Spain Holdings, Inc.; A.I. Credit Consumer Discount Company; A.I. Credit Corp.; A.I. Credit Securities Corp.; A.I. Trade Finance, Inc.; American International Fund Distributors, Inc.; Banque A.I.G.; Eurinvest Finance, S.A.; International Lease Finance Corporation; Dempsey & Company, Limited; Pine Street Holdings, Inc.; Trading & Transportation Management, Inc.; Agency Management Corporation; A.I. Lloyds, Inc.; A.I. Lloyds Insurance Company; A.I. Marine Adjusters, Inc.; A.I. Marine Associates of Illinois, Inc.; A.I. Network Corporation; AIG Aviation, Inc.; AIG Aviation (Canada), Inc.; AIG Aviation (Illinois) Corporation; AIG Aviation (Texas),

Inc.; AIG Aviation Adjustment Service, Inc.; AIG Aviation Brokerage, Inc.; AIG Consultants, Inc.; AIG Consultants (U.K.) Ltd.; AIG Equipment Lessors, Inc.; AIG Hawaii Insurance Company, Inc.; AIG Life Insurance Company; AIG Managing General Agency, Inc.; AIG Marketing, Inc.; AIG Overseas Trade Corp.; AIG Research & Development Corp.; AIG Risk Management, Inc.; AIG Risk Management (Illinois), Inc.; AIG Trade Corp.; AIGM Insurance Service, Inc.; AIU Canada Limited; AIU Insurance Company; ALICO, S.A.; Agency Management Corporation; Agency Management Corporation of Arkansas; American Fidelity Company; American Global Insurance Company; American Home Assurance Company; American International Adjustment Company, Inc.; American International Adjustment Co. of Illinois, Inc.; American International Adjustment Company of Nevada, Inc.; American International Assistance Services, Inc.; American International Assurance Company (Bermuda) Limited; American International Assurance Company, Limited; American International Aviation Corporation; American International Company, Limited; American International Corporation, AIU North America, Inc.; AIU North America (Colorado), Inc.; AIU North America (Connecticut), Inc.; AIU North America (Illinois), Inc.; AIU North America (Louisiana), Inc.; AIU North America (Massachusetts), Inc.; AIU North America (New Jersey), Inc.; AIU North America (North Carolina), Inc.; AIU North America (Texas); America International Assistance Services, Inc.; American International Group Data Center, Inc.; American International Health & Rehabilitation Services, Inc.;

American International Healthcare, Inc.; American International Insurance Company; American International Life Assurance Company of New York; AIG Life Insurance Company of Puerto Rico; American International Marketing Systems, Inc.; American International Oil & Gas Corp.; American International Recovery, Inc.; American International Reinsurance Company, Limited; American International Services, Inc.; American International Surplus Lines Agency, Inc.; American International Specialty Lines Insurance Company (formerly Alaska Insurance Company); American International Underwriters Agency Corporation of Texas, Inc.; American International Underwriters Agency, Inc. (Illinois); American International Underwriters Agency (Missouri); American International Underwriters Agency of Ohio, Inc.; American International Underwriters Corporation; American International Underwriters of Louisiana, Inc.; American International Underwriters Overseas, Ltd.; American International Underwriters (West Coast) Inc.; American Life Insurance Company; Birmingham Fire Insurance Company of Pennsylvania; C.A. Servicios de Propiedades; Central Risk Specialists, Inc.; Commerce and Industry Insurance Company; Commerce and Industry Insurance Company of Canada; Delaware American Life Insurance Company; Dwight Tope State Agency, Inc.; Eastern Risk Specialists, Inc.; Florida Risk Specialists, Inc.; Granite State Insurance Company; The Gulf Agency; Hawaii Insurance Consultants, Ltd.; Hawaii Risk Specialists, Inc.; Illinois National Insurance Company; The Insurance Company of the State of Pennsylvania; International Computer Services, Inc.; La In-

teramericana Compania de Seguros Generales (Columbia); La Interamericana Compania de Seguros Generales (Chile); La Interamericana Compania de Seguros de Vida (Chile); Meridional Compania Argentina de Seguros Sociedad Anonima; Landmark Insurance Company; Landmark Insurance Company (U.K.), Ltd.; Lexington Insurance Company; Louisiana Risk Specialists, Inc.; Malaysian American Assurance Company Berhad; Marketpac International, Inc.; American International Facilities Management; Michigan Risk Specialists, Inc.; Midwestern Risk Specialists, Inc.; Morefar Marketing, Inc.; Mt. Mansfield Company, Inc.; NAM, Inc.; NAM, Inc. (Massachusetts); NAM Managers, Ltd.; N.A.M. Managing General Agency, Inc.; Nan Shan Life Insurance Company, Ltd.; National Union Fire Insurance Company of Louisiana; New England Risk Specialists, Inc.; New Hampshire Indemnity Company; New Hampshire Insurance Company; New Hampshire Life Insurance Company; NHIG Holding Corp.; Norgulf, Inc.; North American Managers, Inc.; Northeastern Risk Specialists, Inc.; Northwestern Risk Specialists, Inc.; Pacific Union Assurance Company; Pennsylvania Brokerage Agency, Inc.; Philam Insurance Company, Inc.; The Philippine American Assurance Company, Inc.; The Philippine American General Insurance Company, Inc.; The Philippine American Life Insurance Company; The Philippine American Management and Financing Company, Inc.; Pine Street Management Company; Reciprocal Managers, Inc.; Risk Specialists Companies, Inc.; Risk Specialists Company of the Carolinas, Inc.; Risk Specialists Company of Colorado, Inc.; Risk Specialists Company of

Connecticut, Inc.; AIG Europe, S.A.; Risk Specialists Company of Indiana, Inc.; Risk Specialists Company of Maryland, Inc.; Risk Specialists Company of Minnesota, Inc.; Risk Specialists Company of New Jersey, Inc.; Risk Specialists Company of New York, Inc.; Risk Specialists Company of Ohio, Inc.; Risk Specialists Company of Tennessee, Inc.; Risk Specialist Company of Wisconsin, Inc.; Southern Risk Specialists of Oklahoma, Inc.; Southeastern Risk Specialists, Inc.; Southern Risk Specialists, Inc.; Ueberseebank A.G.; United Guaranty Commercial Insurance Company; United Guaranty Commercial Insurance Company of North Carolina; United Guaranty Corporation; United Guaranty Credit Insurance Company; United Guaranty Residential Insurance Company; United Residential Insurance Company of North Carolina; United Guaranty Services, Inc.; Western Risk Specialists, Inc.

3. **CIGNA Corporation**
Insurance Company of North America
Indemnity Insurance Company of North America
CIGNA Insurance Company
Pacific Employers Insurance Company
CIGNA Property and Casualty Insurance Company (Formerly Aetna Insurance Company)
Century Indemnity Company
CIGNA Fire Underwriters Insurance Company (formerly Aetna Fire Underwriters Insurance Company)

Respondent Insurance Company of North America

is the parent company of respondent Indemnity Insurance Company of North America. Respondent CIGNA Insurance Company is the parent company of Pacific Employers Insurance Company. CIGNA Property and Casualty Insurance Company (formerly Aetna Insurance Company) is the parent company of respondents CIGNA Insurance Company, CIGNA Fire Underwriters Insurance Company (formerly Aetna Fire Underwriters Insurance Company) and Century Indemnity Company. Respondents Insurances Company of North America and CIGNA Property and Casualty Insurance Company are wholly-owned subsidiaries of INA Financial Corporation, which is a wholly-owned subsidiary of INA Corporation. INA Corporation is a wholly-owned subsidiary of CIGNA Holdings, Inc., which is a wholly-owned subsidiary of respondent CIGNA Corporation. Any and all subsidiaries of these respondents are wholly-owned.

4. **Continental Casualty Company**
Transportation Insurance Company
National Fire Insurance Company of Hartford
Transcontinental Insurance Company
American Casualty Company of Reading, Pennsylvania
Valley Forge Insurance Company

Respondent Continental Casualty Company is the direct or indirect corporate parent of each of the other respondents. CNA Financial Corporation is the parent company of respondent Continental Casualty Company. Any and all subsidiaries of these respondents are wholly-owned.

5. ***Commercial Union* Insurance Companies**
Commercial Union Insurance Company
The Northern Insurance Company of America
The Employers' Fire Insurance Company
American Employers' Insurance Company

The parent companies of respondents are Commercial Union plc., Commercial Union Assurance Company plc., Commercial Union Corporation, and Commercial Union of America. Any and all subsidiaries of these respondents are wholly-owned.

6. **Continental Insurance Companies**
Fidelity and Casualty Company of New York
The Continental Insurance Company
Commercial Insurance Company of Newark, NJ
Boston Old Colony Insurance Company
Fireman's Insurance Company of Newark, NJ
The Glens Falls Insurance Company
Kansas City Fire and Marine Insurance
Niagara Fire Insurance Company

The Continental Corporation is the parent of these respondents. Any and all subsidiaries of these respondents are wholly-owned.

7. **The Hanover Insurance Companies**
The Hanover Insurance Company
Citizens Insurance Company of America
Massachusetts Bay Insurance Company

Allmerica Property & Casualty Companies, Inc. is the parent company of respondent Hanover Insurance Company, which is the parent company of

respondent Massachusetts Bay Insurance Company. Citizens Corporation is the parent company of respondent Citizens Insurance Company of America. Any and all subsidiaries of these respondents are wholly-owned.

8. **Hartford Fire Insurance Company**
Hartford Accident and Indemnity Company
Hartford Casualty Insurance Company
Hartford Underwriters Insurance Company
Twin City Fire Insurance Company
Hartford Insurance Company of the Midwest

Respondent Hartford Fire Insurance Company is the parent company of all other respondents. ADAPT, Inc., International Corporate Marketing Group, Inc. and Thoroughbred International Insurance are subsidiaries of Hartford Fire Insurance Company which are not wholly-owned. Any and all subsidiaries of these respondents are wholly-owned. There is no entity named The Hartford as listed in plaintiffs' Amended Complaint.

9. **Maine Bonding and Casualty Company**
Maryland Casualty Company
Northern Insurance Company of New York
Assurance Company of America
Valiant Insurance Company

The parent companies of respondent Maryland Casualty Company are Zurich Insurance Company U.S. Branch and Zurich Holding Company of America, Inc. Respondent Maryland Casualty Company is the parent company of respondents Maine Bonding and Casualty Company, Northern Insurance

Company of New York, Assurance Company of America and Valiant Insurance Company. Maryland Casualty Company has one subsidiary which is not wholly-owned, Zurich American Life Insurance Company. Any and all other subsidiaries of these respondents are wholly-owned.

10. **National Council on Compensation Insurance**

At the time of the appeal herein, National Council on Compensation Insurance was an unincorporated association with a membership of over 600 insurance companies. National Council on Compensation Insurance has since been incorporated, and has no parent company or subsidiary that is not wholly-owned.

11. **Peerless/Netherlands Group**
Peerless Insurance Company
The Netherlands Insurance Company

The parent company of respondents Peerless Insurance Company and The Netherlands Insurance Company is Nationale-Nederlanden U.S. Property & Casualty Holdings, Inc. Any and all subsidiaries of these respondents are wholly-owned.

12. **Royal Insurance Company of America**
American and Foreign Insurance Company
Globe Indemnity Company
Newark Insurance Company
Safeguard Insurance Company
Royal Indemnity Company

The parent company of all of these respondents is Royal Group, Inc. Any and all subsidiaries of these respondents are wholly-owned.

13. **United States Fidelity & Guaranty Company**

U.S.F. & G. Company is the parent company of respondent United States Fidelity & Guaranty Company. Respondent United States Fidelity & Guaranty Company has numerous subsidiaries, the only ones of which are not wholly-owned are AP Apartments, Inc., Ballston U.S.F. & G. Holding Company, Inc., Intercostal Sunrise Hotel Realty, Inc., and TNP Office, Inc.

14. **The Travelers Insurance Company**
Bankers and Shippers Insurance Company of New York
The Charter Oak Fire Insurance Company
The Travelers Indemnity Company of America
The Travelers Indemnity Company of Illinois
The Travelers Indemnity Company of Rhode Island
The Phoenix Insurance Company
The Travelers Indemnity Company

The Travelers Corporation is the parent company of respondents The Travelers Insurance Company and The Travelers Indemnity Company. The Travelers Insurance Company has one subsidiary which is not wholly-owned, Applied Expert Systems, Inc. The Travelers Indemnity Company has two subsidiaries which are not wholly-owned, Commercial Insurance Resources, Inc. and La Metropole S.A.

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In The

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SANDY RIVER NURSING CARE CENTER, *et al.*,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT BRIEF IN OPPOSITION

Respondents (all defendants below) respectfully submit that the Petition should be denied because the District Court and the Court of Appeals were correct and because there are no special or important reasons to grant certiorari.

STATEMENT

In November 1987 the Maine Legislature enacted a statute ("1987 Act") repealing rate ceilings for workers' compensation insurance that had been imposed by legislation enacted in 1985 ("1985 Act"). The 1987 Act also authorized workers' compensation insurers (as the 1985 Act had not) to submit rate proposals jointly to the Maine Superintendent of Insurance for his approval. After the 1987 Act became effective, insurers requested regulatory approval for higher rates through their collective ratemaking organization, the National Council on

Compensation Insurance (NCCI). Following vigorously contested public hearings, the Superintendent approved increases which were considerably smaller than requested by NCCI, effective as of January 1988. Having had their rates suppressed by rate ceilings for the preceding several years, insurers raised substantially all of their workers' compensation rates to the maximum levels permitted by the Superintendent.

Petitioners are Maine employers who seek to recover, as antitrust damages, the difference between the workers' compensation premiums permitted by the 1987 Act, as implemented by the Superintendent's several ratesetting Orders, and the premiums to which the insurers would have been limited had the 1985 Act's rate ceilings continued in effect. Their claim is based on the allegation that the 1987 Act resulted from

> a conspiracy designed to coerce the State of Maine to repeal the 1985 legislation and to permit rate increases in excess of those permitted by the 1985 legislation. The conspiracy included an agreement to withdraw from the Maine market, and to intimidate and coerce other insurance companies to similarly withdraw from the market.

Complaint ¶ 34, Pet. App. A59.[1]

The Complaint identifies those injured by the alleged conspiracy to coerce the legislature as employers who paid "the higher rates for workers' compensation insurance which resulted from defendants' unlawful conspiracy." Complaint ¶ 55, Pet. App. A68. Plaintiffs do not seek any relief for direct marketplace injury from the alleged conspiracy to coerce the legislature by withdrawing from the market — *i.e.*, no plaintiff requested damages or other relief due to unavailability of coverage or the payment of higher prices during the alleged boycott period.

[1]References to Pet. App. A____ are to the Appendix to the Petition.

Defendants moved for summary judgement on the ground that the antitrust laws could provide no remedy for price increases resulting from state legislation and regulatory action. The District Court granted the motion. Relying upon the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and the corollary doctrine of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the District Court held that conduct which injures plaintiffs only by reason of governmental action is not cognizable under the antitrust laws. As the District Court observed, "[p]laintiffs' alleged injury is directly traceable to the 1987 legislation and to the approval of rate increases by the Maine Superintendent of Insurance." Order And Memorandum of Opinion, Pet. App. A23, A27.[2]

Plaintiffs appealed to the Court of Appeals for the First Circuit. In addition to their allegation of a boycott intended to coerce passage of the 1987 law, plaintiffs' brief on appeal added a conspiracy theory that had not been argued to the District Court: that defendants allegedly agreed to refrain from exercising their statutory option to "deviate" downward from the maximum rates established by the Superintendent of Insurance under the 1987 Act.

The Court of Appeals affirmed the grant of summary judgment.[3] *First*, it held that plaintiffs' "coerced legislation" theory is barred by this Court's recent reaffirmation, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), that an act of government (here, the legislature's

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[2]There is an error in the reproduction of the District Court's opinion in the Appendix to the Petition — pages A27 and A28 should be reversed.

[3]The decision of the Court of Appeals, *Sandy River Nursing Care Center, et al. v. Aetna Casualty and Surety Company, et al.*, 985 F.2d 1138 (1st Cir. 1993) ("*Sandy River*"), is set forth at Pet. App. A3-A22.

removal of rate ceilings) cannot be the basis for an antitrust claim, whatever its origin: "Allegations of coercion, like those of conspiracy, implicate only the off-limits issue of the legislators' motivation." Pet. App. A15.

The Court of Appeals emphasized that it was not holding the alleged boycott immune in itself and that such a boycott, if proved, would be *per se* illegal. It further stated that persons directly injured in the marketplace by such conduct could obtain an injunction and collect damages for injury during the period of the boycott. Pet. App. A12-A13. However, these plaintiffs "explicitly have disclaimed any request for relief based on injury occurring while the boycott was in place . . . ." Pet. App. A13. It is the lack of any such claim of direct marketplace injury from the alleged boycott, the court held, that differentiates this case from *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), on which plaintiffs have principally relied throughout this proceeding.

In *Trial Lawyers*, the court noted, the boycott "directly affected" the marketplace, independent of any municipal action, by "constricting the supply of lawyers available to represent indigent criminal defendants." Pet. App. A12. This case, in contrast, is "fully embrace[d]" by *Omni*, where the decisive factor was that the direct cause of the claimed injury was the action of the state itself and where this Court held that the *Parker v. Brown* doctrine and its *Noerr* corollary forbid looking behind the state's action to determine whether that action was the product of a conspiracy. Pet. App. A15.

Second, with respect to the newly alleged "conspirary not to deviate", the Court of Appeals questioned whether the claim was properly raised because it

> never was offered to the district court; indeed, . . . plaintiffs expressly disclaimed the new statute's relevance to the *Parker* issue. The conspiracy

> achieved success, plaintiffs asserted, when the State enacted the law allowing higher premiums. Led by these arguments, the district court never considered whether the defendants could be held responsible for the rate increases — despite authorization of those rates by the state — if they had conspired not to deviate below the maximum rate.

Pet. App. A18 (citation omitted). The court concluded that the new claim "is in any event unavailing" because such a conspiracy would be exempt from the antitrust laws under the state action doctrine. *Id.*

The Court of Appeals held that the 1987 Act affirmatively expressed a policy displacing competition with regulation, thus satisfying the first prong of the two-part state action test established in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). By authorizing the insurance industry to propose rates collectively, and by placing final decisions on rates in the hands of the Superintendent, "the 1987 Act endorsed cooperative ratesetting and anticipated that most, if not all, insurers [choosing to engage in joint ratemaking] would charge the newly authorized rates." Pet. App. A21-A22. Plaintiffs' alleged "conspiracy not to deviate" from the joint rate thus alleged no conduct that was not a product of the statutory policy in favor of uniform rates. *Id.* Moreover, the 1987 Act had repealed the 1985 Act's prohibition against insurer agreements to adhere to uniform rates; this repeal confirmed that an agreement to adhere to the joint rate was authorized by the new law. *Id.* A19. In short, the court regarded the Maine statute as indistinguishable from the joint ratemaking laws found to "clearly articulate" the displacement of competition in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). Pet. App. A20-A21.

Regarding the second prong of the *Midcal* test, the Court of Appeals determined that defendants' ratemaking activities were "actively supervised" through the ratesetting activities of the Superintendent of Insurance. Pet. App. A19, A21. The appellate court also emphasized that "plaintiffs expressly acknowledge[d] that *Midcal* is satisfied with respect to the[se] ratemaking proceedings." *Id.* A21.

REASONS FOR DENYING THE PETITION

I. THE REJECTION OF PETITIONERS' "COERCED LEGISLATION" THEORY WAS A STRAIGHTFORWARD APPLICATION OF THIS COURT'S STATE ACTION DECISIONS AND RAISES NO ISSUE WARRANTING FURTHER REVIEW.

Petitioners do not contend that there is any conflict in the lower courts with respect to their coerced legislation theory. The best they can do is to suggest that it was not addressed in *Trial Lawyers* and that it is "important".

Plaintiffs' theory was not addressed in *Trial Lawyers* because, as the courts below correctly held, *Trial Lawyers* is a fundamentally different case from this one. The premise of the coerced legislation theory was, however, addressed and rejected in *Omni* and, earlier, in *Hoover v. Ronwin*, 466 U.S. 558 (1984). Both *Omni* and *Hoover* are links in a fifty-year unbroken chain of cases uniformly holding that antitrust claims may not be premised on injury resulting from governmental action. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Parker v. Brown*, 317 U.S. 341 (1943). Petitioners' claim is directly at odds with this consistent rule and does not merit review by this Court.

In *Trial Lawyers*, the issue was whether an economic boycott that caused direct marketplace injury (independent of governmental action) could be excused under the First Amendment because the purpose of the boycott was to induce governmental action. 493 U.S. at 414. The decisive factor in the Court's decision was the direct marketplace impact of the boycott: "The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted." 493 U.S. at 425.[4]

In this case, the question is whether an alleged boycott, whose only alleged economic impact occurred as a result of the legislative action it supposedly induced and subsequent decisions of a state regulator, is remediable at all under the antitrust laws. The defense here is based not on the First Amendment, but on the state action doctrine's bar against application of the antitrust laws to actions of the state.

That bar, as the Court of Appeals held, Pet. App. A14-A15, precludes plaintiffs' quest for recovery from "coerced" state legislation. Citing *Hoover*, this Court in *Omni*

> reaffirm[ed] our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on "perceived conspiracies to restrain trade," *Hoover*, 466 U.S. at 580. We reiterate that, with the possible [government as] market participant exception, *any* action that qualifies as state action is "*ipso*

[4]Commentators agree that the decisive characteristic of the trial lawyers' boycott was that its anticompetive effects "were a result not of the government's independent action, but rather of the action of the respondents," P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 201 at 15 (1991 Supp.), and that the "source of the harm was the private boycott, not action by a governmental body," ABA Antitrust Law Section, *Antitrust Law Developments* 996 (3d ed. 1992).

> *facto* . . . exempt from the operation of the antitrust laws," *id.* at 568.

111 S. Ct. at 1353.[5] Nor are private parties liable for the consequences of state action which they allegedly have induced, for "*Parker* and *Noerr* generally present two faces of the same coin." *Id.* at 1355.

As in *Hoover* and *Omni*, the issue here is not one of standing or proximate cause under section 4 of the Clayton Act, 15 U.S.C. § 15 (1988), but of the scope of the antitrust laws. The Court of Appeals emphasized that petitioners could have sued under section 4 if they had alleged direct marketplace injury from the alleged boycott. The basis for its affirmance, following *Hoover* and *Omni*, was that the antitrust laws do not apply at all to claims of harm caused by state action as distinguished from private action directly impacting the marketplace.

Petitioners' argument that the decision below would eliminate any "disincentive to conspire" by allowing unlawful boycotts to go unpunished, Petition at 14, ignores the full import of the opinion. The Court of Appeals characterized the conduct alleged as a *per se* violation of the antitrust laws and warned that any actual denial of insurance coverage or other marketplace effects resulting from such a boycott could, if proven, be remedied by treble damages and an injunction. The decision was simply an application of the principle, well established in this Court, that the antitrust laws apply to the

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[5]Inquiry into petitioners' allegations that legislators voted for the 1987 Act only because they were "coerced" by respondents' alleged conspiratorial acts would require just "the sort of deconstruction of the governmental process and probing of the official 'intent' that [this Court has] consistently sought to avoid." 111 S. Ct. at 1352. Moreover, petitioners' Complaint in effect asked the District Court to undo the rate increases legislated by the State in 1987 through an antitrust damage award; indeed, it would have done so three times over.

marketplace effects of private anticompetitive activity and not to the effects of state action.

II. PLAINTIFFS' ALLEGED CONSPIRACY NOT TO DEVIATE IS FORECLOSED AS NOT RAISED BELOW AND FAILS UNDER THIS COURT'S WELL-ESTABLISHED STATE ACTION PRECEDENTS.

A. Plaintiffs Did Not Present Their Non-Deviation Conspiracy Claim To The District Court.

Plaintiffs' claim of a "conspiracy not to deviate" from joint rates approved after enactment of the 1987 Act, as the Court of Appeals repeatedly noted, was not presented until appeal. Pet. App. A16, A17, A18. The sole theory of conspiracy actually argued in the District Court was a boycott that occurred before passage of the 1987 Act. Contrary to their appellate claim of a conspiracy to avoid the "deviation" provisions of the 1987 Act, plaintiffs in the District Court "expressly disclaimed the new statute's relevance to the *Parker* issue." Pet. App. A18. Petitioners are confined to the claims presented to the District Court, which forecloses review of their afterthought conspiracy. *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526, 528 n.17 (1983).

Consistent with plaintiffs' disclaimer of reliance on the 1987 Act, they raised no issue concerning its implementation in response to defendants' summary judgment motion. Defendants submitted an affidavit of Maine's former Superintendent of Insurance describing his implementation of the 1987 Act, as well as materials detailing the regulatory hearings in which he considered defendants' rate proposals. Plaintiffs did not

challenge these materials and did not seek discovery under Fed. R. Civ. P. 56(f) regarding implementation of the "deviation" provision (or any other matter). Plaintiffs submitted no contradictory evidence under F. R. Civ. P. 56(e) and conceded in their briefs that these ratemaking proceedings met the "active supervision" standard. Pet. App. A21.

In sum, the appellate court could have affirmed summary judgment without addressing the "deviation" claim substantively because (i) plaintiffs failed to plead and to argue any such claim in the District Court and (ii) plaintiffs raised no issue concerning the regulatory implementation of the 1987 Act. Both of these factors strongly counsel against review by this Court of the eleventh-hour state action theory presented by petitioners.

B. The "Conspiracy Not To Deviate" Theory Raises No State Action Issue That Has Not Been Decided By The Court And Its Rejection By The Court Of Appeals Creates No Conflict With Any Other Circuit.

On five occasions in the past eight terms, this Court has elaborated on the "authorization" and "active supervision" standards for applying state action immunity first set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *See FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991); *Patrick v. Burget*, 486 U.S. 94 (1988); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). Petitioners nevertheless contend that a sixth revisiting of *Midcal* is necessary because of a supposed conflict over "the degree of specificity of state authorization required for a finding that a private

party's particular anticompetitive activity" meets "the first prong of *Midcal*." Petition at 10. The governing authorization standards were, in fact, established in *Southern Motor Carriers* and were faithfully applied by the Court of Appeals here.

Southern Motor Carriers decided the precise "specificity" issue framed by plaintiffs. It held that "[a] private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." 471 U.S. at 64 (citation omitted); *see also id.* at 65 ("if the State's intent to establish an anticompetitive regulatory program is clear, . . . the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws"). The Court of Appeals decision here is precisely congruent with the *Southern Motor Carriers* analysis.

The four states involved in *Southern Motor Carriers* authorized collective ratemaking but did not compel it because each allowed individual companies unilaterally to file for rates lower than those approved in response to joint rate filings. 471 U.S. at 59. The Justice Department argued that the absence of compulsion with respect to collectively set rates showed that the states did not intend to displace competition as *Midcal* requires. Plaintiffs here similarly argue that an exception in the 1987 Act allowing "deviations" below the Superintendent-approved maximum rate indicates that the alleged agreement not to deviate from that rate is not authorized.

The Court in *Southern Motor Carriers* rejected this argument. The laws of the relevant states did displace competition by acknowledging the expectation that "[m]ost common carriers probably will engage in collective ratemaking." 471 U.S. at 59. The Court of Appeals here similarly concluded that the 1987 Act "anticipated that most, if not all, insurers would charge the newly authorized rates." Pet. App. A22.

Because the states' policy was preponderantly one of displacing competition, the Court in *Southern Motor Carriers* determined that this policy was not negated merely because some "carriers individually may submit lower proposed rates to the [regulatory] Commission in order to obtain a larger share of the market." 471 U.S. at 59. The Court of Appeals here similarly concluded that the option to file rate "deviations" below the collectively set rate did not alter the fundamentally noncompetitive nature of Maine's policy under the 1987 Act. The court correctly perceived that the authorization standard proposed by plaintiffs would be satisfied only if Maine had compelled universal use of the joint rate. This, in substance, is the same "compulsion" theory rejected in *Southern Motor Carriers* as transgressing the principle of federal deference to state regulation. Pet. App. A20-A21.

In *Town of Hallie*, which was decided concurrently with *Southern Motor Carriers*, this Court elaborated on the regulatory regime that would reflect an intention to displace competition. In *Town of Hallie*, as recently explained in *Omni*, this Court "rejected the contention that [the first prong of *Midcal*] can be met only if the delegating statute explicitly permits the displacement of competition." 111 S. Ct. at 1350 (citing *Town of Hallie*, 471 U.S. at 41-42). "It is enough," this Court held, "if suppression of competition is the foreseeable result of what the state authorizes." *Id.* (quoting *Town of Hallie*, 471 U.S. at 42).

Plaintiffs' contention that the "conspiracy not to deviate" is not protected because it was not specifically authorized flies in the face of the expansive formulation of the standard set forth in *Town of Hallie* and in the *Southern Motor Carriers* holding that "[r]equiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." 471 U.S.

at 64. In fact, in *Southern Motor Carriers*, this Court afforded state action immunity on the basis of state regulatory policies in Mississippi that were far less "express" in their authorization than those here. The Mississippi statutes subjected rates to regulation but were silent on collective ratemaking. 471 U.S. at 62-65. The Court, nonetheless, held that the state need not "specifically address[] collective ratemaking" if the overall regulatory scheme evidences an intent to displace competition with regulation. 471 U.S. at 67. The Mississippi statute did so because it subjected rates to state approval under a "just and reasonable" standard and because the state's regulatory agency authorized collective ratemaking. *Id.*

The 1987 statutes here displace the marketplace by subjecting defendants' rates to a " '[j]ust and reasonable' " standard, as in Mississippi. Pet. App. A19. They also expressly authorize joint rate filings and repeal a provision from previous law disallowing agreements to adhere to filed rates. These factors fall well within the authorization parameters set forth in *Southern Motor Carriers* and *Town of Hallie*. As the Court of Appeals held, Maine necessarily "condon[es] an agreement among insurers to charge the rates they jointly propose, subject to approval by the Superintendent," Pet. App. A19, which necessarily means that such insurers will not deviate by charging a lower rate. *Id.*

The circuit court conflict asserted by plaintifffs is nonexistent. In four of the five cases characterized as "inconsistent" with the decision below,[6] Petition at 10 nn. 7-8, the courts applied the *Midcal* standards and found sufficient state authori-

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[6] *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991); *Oberndorf v. City and County of Denver*, 900 F.2d 1434 (10th Cir.), *cert. denied*, 498 U.S. 845 (1990); *Traweek v. City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988).

zation for the challenged activity. Hence, there can be no conflict with these cases.

The only circuit decision identified by plaintiffs rejecting state action immunity, *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), does not reflect any disagreement between the First and Ninth Circuits on the applicable legal standards, which both courts acknowledged were set in *Midcal*. Pet. App. A20; 982 F.2d at 392. The differing outcomes in *Brown* and *Sandy River* are attributable to substantial differences in the regulatory systems in the states involved there and those of the state of Maine.[7]

With regard to Arizona, one of the two states involved in *Brown*, the Ninth Circuit focused on a single statutory provision that it interpreted to mandate a competitive system in the absence of "anything in the statute or legislative history to show a contrary intent." 982 F.2d at 393. In Maine, the undisputed statutory and regulatory record *does* show a contrary intent. Joint action on rates was the predominant form of ratemaking under the 1987 Act. The Superintendent testified that "no rate 'deviations' are permitted in the residual market" *i.e.*, uniform rates must be charged without exception.[8] Affidavit of Joseph A. Edwards ¶¶ 14, 15. With respect to the so-called "voluntary" market, the Superintendent interpreted

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[7]It should also be noted that petitioners never cited *Brown* (or any of the other allegedly conflicting decisions) to the Court of Appeals, or made any reference whatever to the subsection of the 1987 Act (Me. Rev. Stat. Ann. tit. 24-A § 2301 (West 1988)) which they now contend so clearly mandates rate competition and which they accuse the Court of Appeals of interpreting inconsistently with *Brown*. Petition at 5, 22. The Petition thus offers an afterthought upon an afterthought.

[8]The Maine statute establishes a "residual market mechanism" in which all insurers are required to participate for purposes of affording coverage to employers unable to obtain it from individual insurers underwriting in the so-called "voluntary" market. Me. Rev. Stat. Ann. tit. 24-A, § 2366 (West 1988).

the statute to "substantially disfavor[] and restrict[] pricing competition" and supported a "single, state-wide filing" because a "unified scheme of pricing enables the Superintendent . . . to thoroughly examine the reasonableness of proposed rates." Edwards Aff. ¶¶ 24, 26, 27.

Moreover, the 1987 Act *repealed* a provision that disallowed agreements among insurers to use only jointly filed workers' compensation rates, the very sort of agreement alleged here. Indeed, the statutory provision quoted in the Petition, Petition at 15, also states that "[n]othing in this chapter is intended to discourage . . . uniformity in insurance rates." Me. Rev. Stat. Ann. tit. 24-A, § 2301 (West 1988). In short, the Maine statute, in conjunction with the undisputed regulatory record in this case, is decisively distinguishable from the record in *Brown* and compels the conclusion that the first prong of *Midcal* has been met.

This Court has previously ruled that Wisconsin, the second state involved in *Brown*, did not "actively supervise" title search fees. *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2179 (1992). Under Wisconsin's so-called "negative option" scheme, proposed rates would go into effect automatically if the Commissioner of Insurance did not actually disapprove them. Maine, in contrast, subjects workers' compensation rates to thorough, on-the-record scrutiny. In the present case, after public hearings in which defendants' filings were vigorously opposed, the Superintendent issued lengthy decisions rejecting those proposals in favor of substantially lower rates. Pet. App. A7. The Court of Appeals accordingly "fail[ed] to see how it could be illegal price fixing for [defendants] to agree to charge the rates allowed by the state, particularly when the approved rates fall below the jointly proposed rates." *Id.* A19.

In sum, *Brown* and *Sandy River* do not conflict on interpretation of the *Ticor* "active supervision" standard; they reflect only differences in the vigor with which Maine on the one hand, and Arizona and Wisconsin on the other, examine the rate filings in issue. The very most that could conceivably be made of differences between the decisions is their varying interpretations of state insurance ratemaking laws,[9] not any disagreement over the applicable state action standards.[10] Conflicting interpretations of different state statutes do not present any question suitable for this Court's review.

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[9]There is no reason for this Court to second guess the Court of Appeals in a matter of how to interpret Maine law. *Cf. Salve Regina College v. Russell*, 499 U.S. 225 (1991) (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (emphasizing primary role of lower court judges in interpreting state law)).

[10]The Petition erroneously describes the Ninth Circuit's "two-step" analysis for application of the first prong of *Midcal* as substantively different from the "one-step" test employed by the First Circuit. Petition at 22-23. The Ninth Circuit itself has employed a "one-step" analysis and has also recognized that "[a]nalytically, all the tests are similar and address the same concerns." *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591 n.1 (9th Cir. 1990).

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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